APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner*, vs. SEINE AND LINE FISHERMEN'S UNION OF SAN PEDRO, affiliated with SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, *Respondent.*	No. 19,227
NATIONAL LABOR RELATIONS BOARD, *Petitioner*, vs. PAUL BIAZEVICH, et al., dba M. V. LIBERATOR, et al., *Respondents.*	No. 19,228

[January 6, 1967]

On Petitions for Enforcement and Cross-Petitions for Review of Orders of the National Labor Relations Board.

Before: BARNES, JERTBERG and KOELSCH, Circuit Judges KOELSCH, Circuit Judge.

These cases are before the court upon separate petitions of the National Labor Relations Board for enforcement of two separate orders, both issued March 2, 1962. This court has jurisdiction under Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), the

alleged unfair labor practices having occurred in San Pedro, California, within this judicial circuit.

Respondent boat owners operate fishing vessels out of San Pedro Harbor in Southern California. In 1955 the fishermen on these boats were represented by Fishermen's Union, Local 33 ILWU. When tuna prices declined markedly in the summer of 1955, the boat owners asked the members of Local 33 to accept wages substantially lower than those to which they were contractually entitled. They refused. As a result, the boat owners, unable to operate at a profit, decided to tie up their boats for the remainder of the year.

Looking ahead to the 1956 season, the boat owners gave Local 33 timely notice of intent to terminate their contract at the end of 1955. In addition, during the last few months of that year the boat owners made it clear to their crew members that continued employment was contingent upon joining Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarer's International Union of North America, AFL-CIO, the only other available source of labor in the area. It is noteworthy that Seine and Line members, having agreed to accept lower wages, continued fishing throughout 1955.

Late in December, 1955, the boat owners sent certain "clothes letters" to their crew members instructing them to remove their belongings from the boats by December 31. In early January 1956 the boat owners, true to their warnings of the past few months, signed an exclusive collective bargaining agreement with Seine and Line. The union security provision of this contract made

membership in the Seine and Line Union an express condition of employment on the boats in question. As a result, most of the Local 33 fishermen refused to fish on these boats in 1956.

On the basis of these facts,[1] the Board, in No. 19,228, made the following conclusions. First, the boat owners, by telling their crew members that they would be replaced unless they joined Seine and Line, interfered with, restrained, and coerced their employees in violation of Section 8(a) (1) of the Labor Management Relations Act, 29 U.S.C. § 158. Second, in accord with a general understanding in the industry, the "clothes letters" constituted discharges of 52 members of the 1955 crew. Because these discharges were motivated by a desire to avoid dealing with Local 33, they were discriminatory within the meaning of Sections 8(a) (3) and 8(a) (1) of the Act. Third, in early January 1956 Seine and Line was not the majority representative of the employees and, at any rate, Local 33 was vigorously maintaining its continuing majority status. Consequently, by entering into and enforcing a union-security contract with Seine and Line at that time the employers discriminated against Local 33 and rendered unlawful assistance and support to Seine and Line, all in violation of sections 8(a) (1), 8(a) (2) and 8(a) (3) of the Act. Fourth, by their participation in the above mentioned contract Seine and Line restrained and coerced employees in violation of sections 8(b) (1) (A) and 8(b) (2) of the Act. Fifth, several of the union security provisions of the

[1]For a more comprehensive analysis of the relevant facts see the Board's own opinion in this case. Paul Biazevich, et al., d/b/a M. V. Liberator, 136 N.L.R.B. 13 (1962).

Seine and Line contract were unlawful on their face. By incorporating into the contract and by enforcing such provisions, the employers violated sections 8(a) (1), 8(a) (2) and 8(a) (3) of the Act, and Seine and Line violated sections 8(b) (1) (A) and 8(b) (2) of the Act.

In No. 19,227 the Board found that Seine and Line's collective bargaining agreements entered into after September 1956 with the owners of 43 other fishing vessels violated sections 8(b) (1) (A) and 8(b) (2) of the Act by virtue of their inclusion of the identical unlawful union security provisions struck down in No. 19,228.

Respondents attack nearly every one of these findings. They claim that their statements, rather than being coercive, merely reflected the facts of labor life in San Pedro Harbor; that the "clothes letters" were not intended to be discharges but, even if they were, the critical factor of illegal intent was not proven; that Seine and Line did represent a majority of the employees but even if it did not the employers had no reasonable basis for crediting Local 33's claim of majority representation; that the union security provisions of Seine and Line's contracts, although technically deficient, were not illegal per se.

Respondents propounded these same claims to the Board, but each was rejected. The Board, in assessing the facts and the inferences to be drawn from them, made contrary conclusions about the nature and significance of the events in issue.

Our scope of review is limited. The question before us, as reviewing court, is not whether the conclusions drawn by the Board are right, but rather whether they are reasonable. See 4 DAVIS, ADMINISTRATIVE LAW

§ 29.06, at 143 (1958). It is not our province to displace the Board's interpretation of conflicting views with our own.

In light of these principles we conclude that the findings of the Board are supported in each case by substantial evidence considering the record as a whole and that, although different inferences might have been drawn from the facts, the Board's construction of the events herein is both reasonable and proper.

But respondents claim that even if there is substantial evidence in the record to support the findings of the Board, we should deny enforcement to the Board's order because the entire proceedings were tainted by grave procedural errors.

Perhaps an outline of the procedural events is in order. This hearing was opened August 5, 1957 and closed July 9, 1958. However, for reasons to be discussed below, the hearing was reopened September 8, 1958 and not ultimately concluded until January 12, 1959.

At the original hearing the trial examiner upheld the refusal of the attorney for the general counsel to produce for purposes of impeachment the signed prehearing statements of witnesses who had testified for the general counsel. After the hearing closed, but before the trial examiner issued his intermediate report, the Board in *Ra-Rich Mfg. Corp.*, 121 N.L.R.B. 700 (1958), under the compulsion of *N.L.R.B. v. Adhesive Products Corp.*, 258 F.2d 403 (2d Cir. 1958) recognized that the principal announced in *Jencks v. United States*, 353 U.S. 657 (1957), regarding the right of counsel in a criminal trial to examine pretrial statements of witnesses called by the government,

was applicable to Board proceedings. Consequently, the trial examiner reopened the record and directed the general counsel to supply respondents with all pre-trial statements made by witnesses who had testified in the earlier proceeding.

At the reopened hearing, 58 of the 71 witnesses who had testified at the original hearing returned and were cross-examined on the basis of their pretrial statements. About 13 witnesses, whose statements had been handed over to respondents, failed to appear for further cross-examination. The Board, however, adequately protected respondents' rights by striking the testimony of these non-appearing witnesses from the record.[2]

But respondents contend that the 58 witnesses subjected to cross-examination at the reopened hearing, over 10 testified to the existence of signed statements which were never produced. Since these statements were allegedly given to either the general counsel or to counsel for the charging party, respondents claim that the Board

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[2]Respondents contend that it was error for the trial examiner to close the hearing before the return date of subpoenas ad testificandum issued to several of those witnesses whose testimony was thus stricken. Respondents have made no claim that they could adduce newly discovered positive evidence through these witnesses. Since the pretrial statements were intended for impeachment purposes, [Palermo v. United States, 360 U.S. 343 (1959)], striking the testimony of such witnesses accomplished for respondents the very best result which they could have hoped to achieve.

erred in failing to strike the testimony of such witnesses in accord with Board Rule 102.118.[3]

However, at the reopened hearing the attorneys for the general counsel and for the charging party, in response to questioning by counsel for respondents, repeatedly stated that they had thoroughly searched their records and had been unable to find any statements other than those which they had already handed over.[4] Where statements have been lost or destroyed in good faith the testimony of the witnesses concerned need not be struck. See *Killian v. United States,* 368 U.S. 231, 239-43 (1961); *United States v. Tomaiolo,* 317 F.2d 324, 327-28 (2d Cir. 1963), *cert. denied,* 375 U.S. 865 (1963).

Next, respondents assert that at the reopened hearing the trial examiner unduly limited the scope of cross-examination of those witnesses who did reappear. It is true that at one point he ordered respondents to limit

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[3]N.L.R.B. Rules and Regulations, as amended, 29 C.F.R. § 102.118 reads, in part relevant here:

> "After a witness called by the general counsel has testified in a hearing upon a complaint under section 10(c) of the act, the respondent may move for the production of any statement of such witness in possession of the general counsel, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be granted by the trial examiner. If the general counsel declines to furnish the statement, the testimony of the witness shall be stricken."

[4]In view of these circumstances, we find it unnecessary to determine whether the rationale of Harvey Aluminum, Inc. v. N.L.R.B., 335 F.2d 749 (9th Cir. 1964), extends so far as to require the production of statements in the possession not of the United States government but of a private party working in close harmony with the government.

their examination to establishing merely the fact of an omission from a witness' affidavit of facts later related by the witness at the hearing. This is contrary to the Board's own ruling in *Tidelands Marine Service,* 126 N.L.R.B. 261 (1960), where it held applicable to Board proceedings the following quotation from *Jencks v. United States,* 353 U.S. 657, 667 (1956):

> "Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the report of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

If, by such a ruling, respondents were denied the opportunity to subject the general counsel's witnesses to a full, complete and proper cross-examination, it is possible that they suffered prejudice.[5] However, such was not the case. Our independent review of the record[6] fails to show that this ruling was enforced. On the contrary,

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[5]Note that in N.L.R.B. v. Bear Brand Roofing, Inc., 312 F.2d 616 (10th Cir. 1962), a limitation of cross-examination to inconsistencies and contradictions was held *not* prejudicial and the petition was enforced.

[6]Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e) provides in pertinent part that "in making the foregoing determinations the court shall review the whole record *or such portions thereof as may be cited by any party. . . .*" (Emphasis added). Although counsel for respondents cited us to the above mentioned ruling, they did not direct our attention to one specific instance in this voluminous record of over 10,000 pages where the trial examiner used this ruling to curb the scope of proper cross-examination.

it appears that, on the whole, the trial examiner was quite liberal in permitting cross-examination.

Furthermore, before the Board, respondents did not except to the intermediate report on the ground that the examiner had improperly limited the scope of cross-examination during the reopened hearing. Accordingly, in the light of section 10(e) of the Act,[7] "the failure or neglect of the respondents to urge an objection in the Board's proceedings forecloses judicial consideration of the objection in enforcement proceedings." *N.L.R.B. v. Ochoa Fertilizer Co.*, 368 U.S. 318, 322 (1961). See also *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 350 (1953); *N.L.R.B. v. Noroian*, 193 F.2d 172 (9th Cir. 1951).

The next assignment concerns the general counsel's refusal at the reopened hearing to consent to the giving of testimony by Regional Director Kennedy and Board Attorney O'Brien. Respondents had intended to interrogate them concerning the existence of any and all documents, not already in respondents' possession, which might be useful for purposes of impeachment. Relying solely on Board Rule 102.118,[8] the trial examiner

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[7]Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) provides in part: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

[8]NLRB Rules and Regulations, as amended, 29 C.F.R. § 102.118 provides in part relevant here:

> "No regional director, field examiner, trial examiner, attorney, specially designated agent, general counsel, member of the Board or other officer or employee of the Board shall pro-

revoked subpoenas duces tecum and ad testificandum properly issued to these employees.

In *General Eng'r, Inc. v. N.L.R.B.*, 341 F.2d 367 (9th Cir. 1965), this court ruled that § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), prohibits the Board from excluding evidence which would be otherwise admissible under the general rules of evidence. The mere existence of Rule 102.118, which expressly forbids employees of the Board from complying with subpoenas duces tecum in the absence of written consent of the general counsel, is not enough to create a recognized evidentiary privilege. In the absence of some valid evidentiary objection, Rule 102.118 cannot be invoked to revoke properly issued subpoenas duces tecum. See also *N.L.R.B. v. Capitol Fish Co.*, 294 F.2d 868 (5th Cir. 1961). Accordingly, the trial examiner erred in this ruling.

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duce or present any files, documents, reports, memoranda, or records of the Board or testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, Territory, or the District of Columbia with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board, whether in answer to a subpoena, subpoena duces tecum, or otherwise, without the written consent of the Board or the chairman of the Board if the official or document is subject to the supervision or control of the Board; or the general counsel if the official or document is subject to the supervision or control of the general counsel. Whenever any subpoena ad testificandum or subpoena duces tecum, the purpose of which is to adduce testimony or require the production of records as described hereinabove, shall have been served upon any such persons

Respondents further assert that the general counsel had certain statements in his possession to which respondents should have had access. At the reopened hearing, Board Attorney O'Brien advised the trial examiner that he had located three stenographic notebooks, all in the handwriting of deceased Field Examiner Karl W. Filter, containing notes relating to the statements of the government's witnesses. Although O'Brien refused to show these memoranda to either the witnesses or opposing counsel he did ask for leave to show them to the trial examiner. The trial examiner refused to examine the documents; furthermore, he declined to order the general counsel to supply them to respondents.

The Board held that the trial examiner's ruling was proper, since none of the notes were signed or authenticated by the witnesses. But if the "Filter memoranda" contained substantially verbatim accounts of pretrial statements orally made to a government agent by government witnesses, they should have been produced. *Cf. Palermo v. United States,* 360 U.S. 343, 345-46 (1959); Jencks Act, 18 U.S.C. § 3500(e). Any construction of the "signed or otherwise approved or adopted" clause of Board Rule 102.118 which would not require that such statements be turned over would be invalid. *Harvey Aluminum, Inc. v. N.L.R.B.,* 335 F.2d 749, 756 & n.25 (9th Cir. 1964).

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or other officer or employee of the Board, he will, unless otherwise expressly directed by the Board or the chairman of the Board or the general counsel, as the case may be, move pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpoena invalidated on the ground that the evidence sought is privileged against disclosure by this rule. . . ."

In a case like this where the Board agent's death precluded any clarification on his part, and where the hazy memories of the witnesses at the reopened hearing made it impossible for them to lay the proper foundation of approval of Filter's writings, it was incumbent upon the trial examiner to examine each of the documents and determine whether they met the "substantially verbatim" test. See *Williams v. United States*, 328 F.2d 178 (D.C. Cir. 1963). At the very least he should have conducted an in camera inspection of the documents. See *General Eng'r, Inc. v. N.L.R.B.*, 341 F.2d 367, 376 (9th Cir. 1965). His reliance on the representations of the general counsel and his refusal to examine the documents when urged to do so was error. See *United States v. Kieg*, 320 F.2d 634 (7th Cir. 1963).

In summation, it appears that the trial examiner committed only two procedural errors. First, he should have personally examined the Filter memoranda to see if they were substantially narrative accounts of the witnesses' statements, and thus produceable on demand. Second, in the absence of a recognized evidentiary objection, he should not have revoked the subpoenas duces tecum issued to the Board employees.

Nevertheless, we do not consider these errors sufficiently grave to deny enforcement.[9] In accord with section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e) a court, on review of an administrative deter-

[9]As respondents themselves admit in their brief, the lapse of almost twelve years since the occurrence of the operative facts militates against remand. The passage of time has rendered a meaningful hearing at this late date virtually impossible.

mination, should take due account of the rule of prejudicial error. Procedural irregularities are not per se prejudicial; each case must be determined on its individual facts and, if the errors are deemd to be minor and insubstantial, the administrative order should be enforced notwithstanding. See *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 692 (9th Cir. 1949), *cert. denied*, 338 U.S. 860 (1949); *Kerner v. Celebrezze*, 340 F.2d 736 (2d Cir. 1965), *cert. denied*, 382 U.S. 861 (1965); *N.L.R.B. v. Ed Friedrich, Inc.*, 116 F.2d 888 (5th Cir. 1940). Moreover, "the burden of showing that prejudice has resulted" is on the party claiming injury from the erroneous rulings. *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943); *Ahern v. Webb*, 268 F.2d 45 (10th Cir. 1959). Respondents here have failed to meet this burden.

The purpose of both the requested in camera inspection by the trial examiner of the Filter memoranda and the enforcement of the subpoenas duces tecum issued to the Board employees was the same — to ascertain whether there existed any pretrial statements other than those already in respondents' possession which, under the guidelines established by both the courts and the Board, the government was obliged to produce. In other words, these measures were intended merely as threshold inquiries designed to generate the same result as would written interrogatories in pretrial discovery proceedings. But in that analogous area an erroneous refusal by a trial judge to order one party to answer interrogatories served upon him by another will not necessarily result in reversal. The moving party must show that he has suffered prejudice

thereby. *Bell v. Swift & Co.*, 283 F.2d 407 (5th Cir. 1960).

For respondents in this case to have been prejudiced by the two challenged rulings, it would be necessary first, that the inspection of the Filter memoranda and the enforcement of the subpoenas would have actually unearthed hitherto undisclosed statements; second, that by means of cross-examination based on these statements the testimony of several witnesses would have been successfully impeached; and third, that the Board, in light of this impeached testimony, would have made different findings. Respondents have failed to persuade us that the establishment of the first of these essential prerequisites—the discovery of pretrial statements not already in respondents' possession — is anything more than a remote possibility. Thus we find it unnecessary to indulge in conjecture about whether the second and third of these prerequisites would have followed.

Before we would be able to determine whether any of Filter's notes are the type of verbatim accounts which should have been turned over for use in cross-examination, we would need an opportunity to personally examine them. But the Filter memoranda have not been made a part of the record herein. "If petitioners wished review of the trial examiner's determination as to the nature of the report, it was incumbent upon them to see that a record was presented upon which review could be had, by requesting that the memorandum be submitted to the court under seal." *Harvey Aluminum, Inc. v. N.L.R.B.*, 335 F.2d 749, 756 (9th Cir. 1964). See also *United States v. Ebeling*, 146 F.2d 254, 256-57 (2d Cir. 1944);

General Eng'r, Inc. v. N.L.R.B., 341 F.2d 367, 376 (9th Cir. 1955); *Appeal of United States Sec. & Exch. Comm'n*, 226 F.2d 501, 510-11 (6th Cir. 1955). Since this was not done, it is impossible to determine whether the memoranda contained remarks which might have served to impeach any witnesses. "Accordingly, we cannot say that the ruling was prejudicial even if we assume it was erroneous." *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943).

Similarly, respondents have made no showing that any additional statements would have been produced by the subpoenas duces tecum. It is on this ground that the case of *General Eng'r, Inc. v. N.L.R.B.*, 341 F.2d 369 (9th Cir. 1965) can be distinguished. There petitioner made a specific offer of proof as to each of the four subpoenaed employees. *Id.* at 370 & n.3. In addition, because of inconsistent explanations made by the government's attorneys there was good reason to believe that some produceable documents might have been withheld.

There were no such extenuating circumstances in this case.[10] On the contrary, as mentioned earlier, counsel for the General Counsel had on several occasions made it clear that he had already handed over all the pretrial statements in his possession.

Respondents' final thrust is directed against the Board's orders. They claim that the order of back pay and reinstatement is unwarranted; that the revocation of Seine and Line's certification and the setting aside of its collec-

[10]A refusal to issue a subpoena, although error, is not always prejudicial. See N.L.R.B. v. Central Oklahoma Milk Producers Ass'n, 285 F.2d 445 (10th Cir. 1960).

tive bargaining agreements with the boat owners herein is exceedingly harsh; that reimbursement of the discriminatees for all dues, initiation fees, assessments and support money illegally exacted from them is unjustifiable.

However, under section 10(c) of the Act the Board is charged with an extremely broad latitude in fashioning remedies to effectuate the purposes of the Act as a whole. *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953). Wherever possible the Board's order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540 (1943). We cannot say that the Board's orders in these cases run afoul of this test.

We have examined respondents' other points on this appeal but find them totally lacking in merit. Accordingly, the Board's orders in No. 19227 and No. 19228 are affirmed and shall be enforced.

APPENDIX B

Paul Biazevich, Dinko Biazevich and Jerry Kusar, d/b/a MV *Liberator*; John Gargas, Nick Gargas, John I. (Jack) Gargas, and Nick Andrich, Jr. d/b/a MV *City of Los Angeles*; Vincent Budrovich and Western Boatbuilding Company, d/b/a MV *Delores M.*; John Cvitanich and Tom Mason, d/b/a MV *Sea King*; Steve Gargas, Anita Gargas, Francis Trutta, Mate Trutta and Frank S. Gargas d/b/a MV *Columbia*; Nick Marincovich and South Coast Fisheries, d/b/a MV *New Sea Rover*; Norman Mezin and Western Boatbuilding Company, d/b/a MV *Western Fisher*; Andrew Rafkin, Jr., Matt Dragich, Peter Dragich and Frank Kostrencich, d/b/a MV *Sea Scout*; John Sestich, Dominic Picinich, Nick Mosich, Gloria Wall and Miles Grades, d/b/a MV *Arlene S.*; John Stanovich, Nickolas Stanovich, Carl A. Larsen and French Sardine Company, d/b/a MV *Golden West*; John Misetich, Dominick Misetich, Jakov Misetich, Martin Tarabochia, Anton Karmen Misetich, Charles A. Curevich and Mathie D. Curevich, d/b/a MV *Ronnie M.*; John Zorotovich, Philip Mladineo, Martin Monas, Anton Misetich, Ivan Misetich and Dominick Misetich, d/b/a MV *Defense*; Lawrence Zuanich, John A. Zuanich and Constanta Zardeneta, d/b/a MV *Stranger*; John K. Vilicich, Administrator of the Estate of Andrew Vilicich, Deceased, d/b/a MV *Marsha Ann*; and American Tuna Committee *and* Fishermen's Union, Local 33, ILWU *and* Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International

Union of North America, AFL-CIO, Party to the Contract[1]

Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO *and* Fishermen's Union, Local 33, ILWU *and* American Tuna Committee, Party to the Contract. *Cases Nos. 21-CA-2388, 21-CA-2389, 21-CA-2390, 21-CA-2391, 21-CA-2392, 21-CA-2393, 21-CA-2394, 21-CA-2395, 21-CA-2396, 21-CA-2397, 21-CA-2398, 21-CA-2399, 21-CA-2400, 21-CA-2401, 21-CA-2402, and 21-CB-772. March 2, 1962*

DECISION AND ORDER

On February 9, 1960, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that all the Respondents except Lawrence Zuanich, John A. Zuanich and Constanta Zardeneta, d/b/a MV *Stranger*, had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, exceptions to the Intermediate Report and supporting briefs were filed by the Respondent Employer, American Tuna Committee (herein referred to as ATC); the Respondent Union,

[1]Fishermen's Union, Local 33, ILWU, is the Charging Party, and Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO, is the Party to the Contract, in Cases Nos. 21-CA-2388 through 21-CA-2402. The individual Employers as well as American Tuna Committee, of which they are all members, are referred to as Respondent Employers.

Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO (herein referred to as Seine and Line); the Charging Party, Fishermen's Union, Local 33, ILWU (herein referred to as Local 33); and the General Counsel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial

error was committed.[2] The rulings are hereby affirmed. The Board has considered the entire record in these cases,[3] including the Intermediate Report and the exceptions and briefs,[4] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner

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[2]ATC moved to dismiss the complaint on the ground that the Trial Examiner at the opening of the hearing erroneously granted the General Counsel's motion to strike the following affirmative defenses from the ATC answer: (1) that Local 33 refused to recognize or bargain with ATC or other boatowners between October 26 and December 15, 1955, in violation of Section 8(b)(3); (2) that Local 33 called a strike with the object of forcing the boatowners to designate the Fishermen's Cooperative Association (herein referred to as the Co-op) as their bargaining representative, in violation of Section 8(b)(1)(B) and (4)(A); and (3) that Local 33 failed to comply with the filing requirements set forth at that time in Section 9(f), (g), and (h). No charges have been filed alleging that Local 33 engaged in the violations designated as (1) and (2). Furthermore, there is no contention, and the record does not show, that the Respondents were precluded from introducing evidence in support of these allegations. Moreover, the first contention is irrelevant as it does not constitute a defense to the violations alleged in this complaint. To the extent that (2) is relevant to the illegal strike issue herein, all evidence adduced in support thereof has been carefully considered by the Board in its resolution of this and other issues in these cases. As to (3), it is well established that, prior to the repeal on September 14, 1959, of Section 9(f), (g), and (h), the Act required that a charging party be in compliance therewith only on the date the complaint was issued. *Stowe-Woodward, Inc.*, 123 NLRB 287, 297. Moreover, the factual question of compliance is litigable only in a collateral proceeding which none of the parties requested. *Sea View Industries, Inc.*, 127 NLRB 1402, footnote 1. We are administratively satisfied that Local 33 was in compliance on the date the complaint was issued, and, therefore, we find that the striking of the aforesaid defenses by the Trial Examiner was not prejudicial.

with the following exceptions, modifications, and additions:

1. During the original hearing, the Respondents made several efforts to obtain pretrial statements of the General Counsel's witnesses. Counsel for the General Counsel refused to produce them, and his refusal was affirmed by the Trial Examiner, the General Counsel, and the Board on interlocutory appeal, in accord with the Board policy at that time as expressed in *The Great Atlantic and Pacific*

The Respondents also objected to the following rulings by the Trial Examiner: (1) Refusal to grant continuances requested by the Respondent Union. It is well settled, however, that continuances are within the discretion of a Trial Examiner. *Plumbers and Steamfitters Union Local 100, affiliated with the United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, AFL-CIO, et al. (Beard Plumbing Company)*, 128 NLRB 398, 400. (2) Rejection of an offer of proof by ATC that a substantial number of the General Counsel's witnesses executed a document promising to pay attorney fees to the Charging Party's counsel out of backpay, leaving the amounts blank so that any or all of their backpay could be claimed. Such attorney fee arrangements, however, are not relevant in these proceedings. The motions to dismiss on these grounds are therefore hereby denied.

[3]The Respondents moved to dismiss the complaint because of the Board's delay in issuing the complaint and in proceeding with the hearing, allegedly caused by the Board's decision to litigate first a representation proceeding involving the same parties. The Board's administrative determination to litigate the representation proceeding first, and the reasons therefor, are fully set forth in its Decision, Order, and Direction of Elections in that proceeding, *Krist Gradis, et al.*, 121 NLRB 601, 615. See *N.L.R.B. v. Wilson Line, Inc.*, 122 F. 2d 809, 816 (C.A. 3). This motion to dismiss is therefore denied.

[4]The Respondents' request for oral argument is hereby denied as the record, including the Respondents' briefs, adequately presents the issues and positions of the parties.

Tea Company, National Bakery Division 118 NLRB 1280. After the hearing closed but before the Trial Examiner issued his Intermediate Report, the Board, in *Ra-Rich Manufacturing Corporation,* 121 NLRB 700, overruled *The Great Atlantic and Pacific Tea* case, and required the production, upon request, for purposes of cross-examination, of pretrial affidavits made by witnesses who had testified in Board proceedings. Thereupon the Trial Examiner reopened the record in these cases and directed the General Counsel to produce all pretrial statements within the purview of the *Ra-Rich* decision. At the reopened hearing, the General Counsel and the Charging Party stated that they had produced all such statements in their possession. The 58 witnesses who had previously testified for the General Counsel returned and were cross-examined on the basis of their pretrial statements; 13 additional witnesses who had previously testified and had made pretrial statements which were produced did not return for cross-examination thereon.

The Respondents contend that the complaint should be dismissed because the pretrial statements were produced too late for effective cross-examination. It is clear, however, that the Trial Examiner properly refused to require production of the pretrial statements prior to the issuance of the Board's decision in *Ra-Rich,* and the procedure he followed — ordering production of the statements and reopening the hearing for cross-examination on the basis thereof after *Ra-Rich* was issued — has been approved by the Board and the courts.[5] Moreover, lapse of time does

[5]See, e.g., *N.L.R.B.* v. *Adhesive Products Corp.,* 258 F. 2d 403 (C.A. 2); *Ra-Rich Manufacturing Corporation, supra; Tidelands Marine Service, Inc.,* 126 NLRB 261.

not, in itself, provide a basis for dismissing the complaint.

The Respondents further contend that the name of the 13 witnesses referred to above should be stricken from the complaint, or, alternatively, that their testimony should be stricken from the record.[6] We agree with the Respondents that the testimony of these 13 witnesses should, under the circumstances, be stricken from the record,[7] and the Respondents' motion to that effect is hereby granted. We do not agree, however, that the names of any of these 13 witnesses, whose alleged discriminatory discharges are discussed below, should be stricken from the complaint on this ground.[8]

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[6]The 13 are Ante Matura, Peter Uskovich, and Sam Uskovich of the *Columbia;* Tony Marincovich of the *Defense;* Anthony Dulcich (or Dolcich) and Jerry Marincovich of the *Delores M.;* James Kaseroff and Christ Lisica of the *Marsha Ann;* Vince Beato of the *New Sea Rover;* John Starcich of the *Sea King;* Mike Elich and Marion Petrov of the *Sea Scout;* and Vincent Gargas of the *Western Fisher.*

[7]*Lenscraft Optical Corporation and Rayex Corporation,* 128 NLRB 807, 814; *Tidelands Marine Service, Inc., supra; Conso Fastener Corporation,* 123 NLRB 1161.

[8]*Ibid.;* see also *New Madrid Manufacturing Company, a corporation, and Harold Jones, an individual, d/b/a Jones Manufacturing Company,* 104 NLRB 117, 119-120 enfd. as modified 215 F. 2d 908 (C.A. 8).

The Respondents also except to the credibility findings of the Trial Examiner, and particularly to his failure to refer in the Intermediate Report to the pretrial statements and the cross-examination thereon. It is well established that the Board will overrule a Trial Examiner's credibility findings only if it finds that they are clearly incorrect.[9] Having examined the entire record in these cases, we find no basis for overruling the credibility findings except as specifically provided herein.[10]

Although several other witnesses testified that they also signed pretrial statements for the Charging Party or the General Counsel, counsel stated that they were unable to identify such statements as they did not have them in their possession. Counsel for the General Counsel, in searching Regional Office files for pretrial statements, discovered several notebooks of a Board agent who had conducted the pretrial investigation and had examined some of the General Counsel's witnesses at the original hearing, but who died before the hearing was reopened. None of these notes were signed or authenticated by witnesses. We therefore find that the Trial Examiner properly refused to require the production of these alleged statements or of the Board agent's notes.

[9] *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F. 2d 362 (C.A. 3).

[10] We find merit in the Respondents' exception to the Trial Examiner's apparently inadvertent crediting of the testimony of Vlado Matejic of the *Sea Scout* that Andrew Rafkin, Jr., master, told him on December 23, 1955, that everyone in the crew would have to belong to Seine and Line in order to fish on that vessel, as the parties agreed at the hearing to strike this testimony. We note, however, that a fellow crewmember, Dragich, credibly testified to the same effect regarding this incident. This apparent inadvertence is therefore immaterial.

2. As more fully set forth in the Intermediate Report, Local 33, which represented the employees of the Respondent boatowners, refused in the late summer of 1955, to agree to accept wages lower than those required by their current contract. The boatowners, on the ground that they were unable to operate at a profit because of falling tuna prices, tied up their boats for the remainder of the year, withdrew authority from the Co-op to represent them, formed ATC, and gave Local 33 timely notice of intent to terminate their contract at the end of the year. Late in December 1955, the boatowners instructed their crews, by letters addressed to their homes to remove their belongings from the boats by December 31. On December 27, the crewmembers began to picket the ATC boats. On January 3, 1956, the boatowners met with a representative of Seine and Line and, in the early morning of January 4, signed a collective-bargaining agreement with that Union. Shortly thereafter they resumed tuna fishing operations with new crews.

We find, in agreement with the Trial Examiner, that the Respondent boatowners, by telling employees on various occasions during the fall and winter of 1955 that they could continue to work after the end of the year only if they joined Seine and Line, interfered with,

restrained, and coerced their employees in violation of Section 8(a)(1) of the Act.[11]

3. We likewise agree with the Trial Examiner that the Respondent Employers who own the *Liberator, City of Los Angeles, Delores M., Sea King, Columbia, New Sea Rover, Sea Scout, Arlene S., Ronnie M.,* and *Defense* discharged the members of their 1955 crews in order to avoid dealing with Local 33. The discharges were

[11]In a special defense to the 8(a)(1) allegations, ATC contends that the Trial Examiner erred in finding that the testimony of John Zorotovich, master of the *Defense,* did not in any substantial way deny the statements attributed to him by members of his crew, and that Zorotovich's testimony shows that he was merely informing the crew how they could cause the boats to resume fishing, which was held not unlawful in *Mike Trama (F/V "Sandy Boy"),* 125 NLRB 151. Zorotovich testified that he told his crewmembers he had heard from fishermen that Local 33 employees of ATC boats were going to form an AFL "B" union; that, although he did not tell them to change unions, he did tell them they should check with the AFL and, if the rumors were true, should let him know within 2 days what they were going to do because others were asking for chances to go fishing with him and he had to go fishing; and that, when he did not hear from any of his old crewmembers, he started hiring new men on December 29. It is clear that Zorotovich was in fact giving his employees a choice of changing unions or being replaced. Such remarks have been held unlawful in many cases, including the *Sandy Boy* case. There is no indication here, as there was in the remarks found not unlawful in *Sandy Boy,* that Zorotovich was only suggesting a way that the crew, the boat, and the master could resume fishing together. We therefore find no merit in this special defense.

In view of the fact that we have stricken from the record the testimony of the 13 witnesses named in footnote 6, above, we do not adopt any of the Trial Examiner's findings of Section 8(a)(1) violations based solely on their testimony, but adopt all his other findings of 8(a)(1) violations.

effected by the "clothes letters" which these boatowners sent to their crews telling them to remove their belongings from the boats by December 31, 1955. The record shows that, in accord with industry practice, crewmembers had an expectation of working aboard the same vessel until they were discharged or quit; that it was customary, therefore, for crewmembers to leave their clothes and belongings aboard the vessel between seasons; and that removing them was understood in the industry to signal the end of employment on that vessel, by quitting if removed voluntarily, by discharge if removed on orders from management. ATC contends in its brief that the "clothes letters" were not intended as discharges, but (1) were sent on advice of counsel to prevent crewmembers from claiming they were hired for the 1956 season and were therefore entitled to a share in the proceeds of the 1956 season whether or not they worked that season, pursuant to a court decision in the *Pioneer* case,[12] or (2) "were somewhat in the nature of a notification of intent to replace" the picketing crews who, ATC contends, were engaged in a strike, and the letters therefore "appear, on their face," to be a technical maneuver designed to induce the alleged strikers to resume work. However, these asserted reasons for sending the letters are inconsistent with each other, as well as with the position previously taken by ATC in a letter to Local 33 dated December

[12]The *Pioneer* case was an admiralty proceeding (*Vitco v. Joncich,* 130 F. Supp. 945) in which the U.S. District Court, S.D. California, in April 1955, held that a fisherman hired on the *Pioneer* in December 1951 to fish for tuna for the next season, but who became ill on board on January 24, 1952, and did not fish thereafter, must be paid his full share of the boat's proceeds for the calendar year 1952 under maritime law.

28, 1955, asserting that the crews had quit and that the boats had had no crews for many months. These reasons not only constitute shifting defenses, but, in addition, neither reason is supported by the evidence. Thus, while all eight masters who testified stated that the letters were sent on advice of counsel, only three of them testified that counsel's advice was based on the *Pioneer* case, and none of them gave to any crewmembers with whom they discussed the letters this reason for sending the letters. Nor do we agree that the letters were meant as notices of intent to replace strikers because, in addition to the considerations discussed below, the evidence shows that the decision to send them was made before the picketing began on December 27, 1955.[13] Accordingly, we find, in agreement with the Trial Examiner, that the "clothes letters" were intended by the boatowners who sent them, and were understood by the crewmembers who received them, to constitute discharges.

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[13]The following occurred before the picketing began: The master of the *Defense* told three members of his crew that they would soon receive the "clothes letters," and two others that they would have to join Seine and Line to fish with him in 1956; the master of the *Columbia* told a crewman that he would have to join Seine and Line to remain in his employ; the master of the *Sea Scout* told two crewmembers that they would have to join Seine and Line if they wished to remain with the vessel; the master of the *Sea King* told one crewman that he would receive a "clothes letter" and that the master would have to get a crew that belonged to Seine and Line, and told another crewman that he was thinking of "going Seine and Line," and, if he did, the old crew would not be retained; the master of the *Ronnie M.* handed one crewmember a copy of the "clothes letter"; and the master of the *Arlene S.* told two crewmembers that he was going to contract with Seine and Line, and they should take their clothes off the boat.

The boatowners contend, in effect, that even if the 1955 crewmembers are found to have been discharged, the discharges were not discriminatory as they were motivated solely by economic considerations. Thus, the boatowners assert that they were satisfied with the work performed by the crewmembers; that, as former members of Local 33 themselves, they would have preferred continuing to contract with that Union; and that they did not continue solely because the economic demands of the crewmembers, voiced through Local 33, were impossible to meet. Unlike our dissenting colleague, however, we do not find that the evidence supports the boatowners' contention that the economic demands of Local 33 were "impossible." In fact, contrary to the contention that the Local 33 demands were so inflexible that it was impossible for the boatowners to deal with that Union, the record shows that, even though Local 33 had a written collective-bargaining agreement with the boatowners covering the year 1955, Local 33 agreed on three occasions during the first 7 months of 1955 to modify that agreement to provide for progressive reductions in the rate of pay to crewmembers because of the falling price of tuna. When the price fell for the fourth time that year, the Union attempted to hold the line but, after the boatowners had refused for about 3 months to operate under the terms of the agreement, Local 33 gave in and offered to modify the written contract in certain respects, including acceptance of payment based on the market price of tuna. The boatowners, however, failed to pursue this offer of Local 33 to further modify the 1955 agreement. Thereafter, they avoided all efforts made by Local 33 to negotiate a new agreement for 1956, and, instead,

precipitately entered into a contract with Seine and Line, in which they agreed to pay the same rate which Local 33 had previously offered to accept. In addition, the boatowners failed to substantiate on the record their contention that they could not afford to pay their crews on the basis of the tuna prices in the Local 33 contract. Moreover, even if there were convincing evidence of economic hardship, it would not leave the boatowners free to discharge their employees in order to avoid dealing with their bargaining representative. The Board and the courts have held that neither good faith nor economic exigencies justify such discriminatory and coercive conduct.[14]

The Respondents further contend that the crewmembers were not entitled to reinstatement, even if they were discharged, because they engaged in an illegal strike with the object of forcing the boatowners to violate Section 8(a) (3) of the Act by renewing the collective-bargaining agreement between Local 33 and the Respondent boatowners, which contained an unlawful union-security clause, or by executing a new closed-shop contract; and, further, that the strike was in violation both of a no-strike clause in the Local 33 agreement and of Section 8(d) of the Act. We are convinced, however, that the employees were not engaged in a strike at the time they

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[14] *Weyerhaeuser Company,* 134 NLRB 1371; *Combustion Engineering, Inc.,* 130 NLRB 184, 201-202; *N.L.R.B.* v. *J. E. McCatron, et al., d/b/a Price Valley Lumber Co., et al.,* 216 F. 2d 212, 215 (C.A. 9); *N.L.R.B.* v. *National Maritime Union of America, et al. (The Texas Company),* 175 F. 2d 686, 689 (C.A. 2); *N.L.R.B.* v. *Gluek Brewing Company and Bach Transfer and Storage Company,* 144 F. 2d 847, 853 (C.A. 8); *N.L.R.B.* v. *Star Publishing Co.,* 97 F. 2d 465, 470 (C.A. 9).

were discharged. When the picketing began on December 27, 1955, the boats had been tied up for many months, during all of which time the employees were willing, while the boatowners were unwilling, to work under the terms of the then current agreement. Moreover, the boats customarily did no tuna fishing between Christmas and the end of the year. It is clear, therefore, as the Trial Examiner found, that there was no concerted stoppage of work and withholding of services because at the time in question no work was being scheduled or permitted by the boatowners.[15]

Moreover, even assuming that the picketing was considered to constitute a strike, it would clearly be an unfair labor practice strike. Continued employment of the old crewmembers in 1956 was conditioned upon their accepting Seine and Line as their bargaining representative, and these crewmembers were protected by the Act in their refusal to accept employment under such a discriminatory condition.[16] While one of the original objectives of the picketing was renewal of the Local 33 agreement, which contained an unlawful union-security clause, and while Local 33 did later request a closed-shop contract in return for withdrawal of its wage demands, the record neither shows that Local 33 was adamant in its union-security demands, nor that such demands were at any time a *major* objective of the picketing. On the contrary, Local 33 clearly indicated on a number of occasions

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[15] *Wakefield's Deep Sea Trawlers, Inc., and Wakefield Fisheries, Inc.*, 112 NLRB 1357.

[16] *J. W. Saltsman doing business as Saltsman Construction Company*, 123 NLRB 1176, 1181, enfd. in this respect 283 F. 2d 472 (C.A. 6).

its willingness to negotiate the terms of a new agreement with the boatowners. Moreover, as the Trial Examiner found, the boatowners terminated the Local 33 contract and discharged their employees not because of any objection to Local 33's union-security demands, as shown by the fact that their contract with Seine and Line contained unlawful union-security provisions, but because of their desire to replace Local 33 with Seine and Line as the representative of their employees. Under these circumstances, we see no justification for depriving these discriminatorily discharged employees of their rights under the Act[17] because, in the course of trying to negotiate with the boatowners, Local 33 made certain union-security demands.

Nor do we agree that the picketing, even assuming that it was a strike, violated the no-strike clause in the Local 33 agreement in view of the serious unfair labor practices which we have found in these cases.[18] Moreover, the procedure established in the no-strike clause provided that all disputes must be referred to a committee made up of representatives of Local 33 and the Co-op. As Local 33 contended in a letter to ATC dated December 29, 1955, the Respondent Employers' prior withdrawal of the Co-op's authority to represent it had rendered this provision of the contract inoperative.

We also disagree with the Respondent's contention that the picketing was unlawful because it occurred within the

[17]Cf. *N.L.R.B.* v. *Sunrise Lumber & Trim Corp.*, 241 F. 2d 620, 624-625 (C.A. 2), enfg. 115 NLRB 866; *Mackay Radio and Telegraph Company, Inc.*, 96 NLRB 740.

[18]*Arlan's Department Store of Michigan, Inc.*, 133 NLRB 802.

60-day period prior to the expiration date of the contract, in violation of Section 8(d) of the Act. We do not believe that Section 8(d) applies in a situation where, as here, it was the employers who served the 8(d)(1) notice on the union of their desire to terminate the contract, and who failed to offer to meet and confer with the union for the purpose of negotiating a new contract, as required by Section 8(d)(2), or to notify Federal and State mediation services of the existence of a dispute, as required by Section 8(d)(3). Having themselves thus failed to comply with the requirements of Section 8(d), the Respondent Employers cannot now invoke the provisions of that section to excuse them from the consequences of their unfair labor practices.[19]

Accordingly, we agree with the Trial Examiner that the Respondent Employers discharged the employees whose names are listed in Appendix A, attached hereto, in order to avoid dealing with Local 33, and not for the reasons advanced by the Respondent Employers, and that the Respondent Employers thereby violated Section 8(a)(3) and (1) of the Act.

4. Based on credited testimony of the master of the *Marsha Ann*, the Trial Examiner found that all the crewmembers of this vessel except James Kaseroff had been hired in 1955 for one trip only, and therefore ceased to be employees before the "clothes letters" were sent. The Trial Examiner credited testimony of Kaseroff, however, that he had not been told that his employment was for one

[19]Cf. *United Electrical, Radio and Machine Workers of America, Local 1113 (Marathon Electric Manufacturing Corp.)* v. *N.L.R.B.*, 223 F. 2d 338, 342 (C.A.D.C.).

trip only, and found that Kaseroff therefore remained an employee after the last trip until he was discriminatorily discharged by a "clothes letter."

Because Kaseroff did not return to the reopened hearing for cross-examination on his pretrial affidavit, we have stricken his entire testimony from the record. Without this testimony, the record establishes that all members of this crew were hired for one trip only. We therefore find that Kaseroff had ceased to be an employee of the *Marsha Ann* before he received the clothes letter, and, accordingly, that the owners of this vessel have not discriminatorily discharged any employees.

5. We adopt the Trial Examiner's findings that ATC and its boatowner members, except the owners of the *Stranger*,[20] rendered unlawful assistance and support to Seine and Line and discriminated against their employees, and that Seine and Line restrained and coerced, and caused and attempted to cause ATC and its boatowner members to discriminate against, such employees by entering into and enforcing a union-security contract.

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[20]All but three of the boatowners signed the Seine and Line contract on January 4, 1956; the *Marsha Ann* signed a few days later. The *Golden West* was a member of ATC from its inception; its owner recognized Seine and Line as the representative of its crew at the January 3 to 4 meeting, which he attended; and he signed the contract in May 1956. The owners of the *Stranger* did not attend the January 3 to 4 meeting and never did sign the contract.

Seine and Line was not at that time the majority representative of the employees covered by the contract.[21] Moreover, Local 33, which was the incumbent contractural Union, was vigorously maintaining that it was the continuing majority representative.[22] Accordingly, we find that, by such conduct, the Respondent Employers violated Section 8(a) (1), (2), and (3), and Seine and Line violated Section 8(b) (1) (A) and (2) of the Act.

6. The contract executed by Respondent Employers and Seine and Line required, as conditions of employment, that all employees (1) join and pay dues to Seine and Line or, if not members, pay support money to that Union, without allowing the statutory 30-day grace period, (2) pay unspecified nonperiodic assessments, and (3) execute involuntary checkoff authorizations. The contract also called for forfeiture of earnings by all employees who failed to pay to Seine and Line the amounts

[21]Cf. *Bernard-Altmann Texas Corporation,* 122 NLRB 1289, 1291-1292, enfd. 280 F. 2d 616 (C.A.D.C.), affd. 366 U.S. 731. In the absence of exceptions thereto, we hereby adopt *pro forma* the Trial Examiner's finding that the employees of all the boat-owner-members of ATC constitute an appropriate unit. In finding that Seine and Line did not represent a majority of employees in this unit on January 4, 1956, we rely on the fact that the crew-members found to have been discriminatorily discharged constituted a substantial majority of the employees on these vessels, and they had not designated Seine and Line as their representative; we do not rely on Seine and Line's failure to prove, as an affirmative defense, that it represented a majority, as discussed by the Trial Examiner. See *Local Lodge No. 1424, International Association of Machinists, AFL-CIO, et al. (Bryan Manufacturing Co.)* v. *N.L.R.B.,* 362 U.S. 411, footnote 7.

[22]*Midwest Piping & Supply Co., Inc.,* 63 NLRB 1060; *Novak Logging Company,* 119 NLRB 1573.

described above and who were not discharged therefor. By incorporating into their contract and enforcing the aforesaid union-security provisions, we find, as did the Trial Examiner, that the Respondent Employers, except the owners of the *Stranger,* violated Section 8(a)(1), (2), and (3) of the Act and that Seine and Line violated Section 8(b)(1) (A) and (2) of the Act.[23]

THE REMEDY

Having found that the Respondent Employers and the Respondent Union have engaged in unlawful practices, we shall order that they cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

We have found that all the Respondent Employers, except the owners of the *Marsha Ann, Golden West, Western Fisher,* and *Stranger,* discriminatorily discharged their employees. We shall therefore order them to offer to such employees immediate and full reinstatement on the vessels from which they were discharged, without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of pay suffered as a result of the discrimination against him during the period from March 30, 1956,[24] until the date the vessel in

[23]We do not pass on the Trial Examiner's additional finding that the provision requiring payment of dues 12 months in advance was unlawful, as the record herein is inadequate with regard to this matter, and as determination of this issue would not, in any event, affect the remedy herein.

[24]As no exceptions were filed to the Trial Examiner's recommendation that backpay should be paid from March 30, 1956, this recommendation is adopted *pro forma.*

question sank, or the date on which he was offered reinstatement, whichever occurs sooner. As we have found that Seine and Line, by executing and enforcing the unlawful union-security contract, caused and attempted to cause the boatowners' discrimination against such employees by requiring as a condition of their continued employment that they join or pay support money to that Union, we shall hold the Respondent Union jointly and severally liable with the Respondent Employers for backpay until 5 days after it notifies the Employers, in writing, sending copies to the employees listed in Appendix A, that it withdraws its objections to their unconditional reinstatement.

Having found that ATC and its boatowner members have rendered unlawful assistance and support to Seine and Line, we shall order them to withdraw recognition from Seine and Line and to cease enforcing their contract with that Union. In addition, we shall set aside the certification of representatives issued conditionally to Seine and Line on October 20, 1958.[25]

The record shows that some of the discriminatorily discharged employees, although they were members of Local 33, later accepted employment on vessels of the ATC boatowners and, as a condition of retaining such employment had to pay dues or support money to Seine and Line. We find that all such employees who were previously members of Local 33 and not of Seine and Line, and either joined or paid support money to the latter Union, did so involuntarily because the contract required it as a condition of employment. We shall there-

[25]See *Kristi Gradis, et al., supra.*

fore provide that these employees be reimbursed, jointly and severally, by the Respondent Union and the Respondent Employers for all dues, initiation fees, assessments, and support money in lieu thereof, paid under these circumstances.[26] However, we shall not require the refund of sums paid to Seine and Line by other fishermen who were employed by these vessels after the Seine and Line contract was signed, who were previously members of Seine and Line and not of Local 33. The contract did not require, and the evidence does not show, that such employees joined Seine and Line for the purpose of obtaining these jobs. As such voluntary members are not shown to have been coerced into joining, remaining members of, or paying money to, Seine and Line, we find that the refund of such payments would not serve to dissipate the effects of the unfair labor practices found herein or effectuate the policies of the Act.[27]

ORDER

Upon the entire record in these cases, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that:

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[26]Our reimbursement order is not to be construed as requiring refund of a charge of one-half percent of each crewmember's share of the catch paid to Seine and Line, as this charge apparently was made in accordance with industry practice to compensate a union for services rendered employees in connection with the distribution of the proceeds of the catch, and not as an obligation of membership in that Union. We consider the Trial Examiner's recommendation that "other contributions" be refunded as too vague, and therefore do not adopt it.

[27]*Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al. (Mechanical Handling Systems)* v. *N.L.R.B.*, 365 U.S. 651.

A. The Respondent Employers, including the owners and masters of the vessels *Liberator, City of Los Angeles, Delores M., Sea King, Columbia, New Sea Rover, Western Fisher, Sea Scout, Arlene S., Golden West, Ronnie M., Defense,* and *Marsha Ann,* and American Tuna Committee, jointly and severally, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Recognizing Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO, or any successor thereto, as the representative of any of their employees for the purpose of dealing with said organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until that organization shall have been recertified by the Board as the exclusive representative of such employees.

(b) Performing or giving effect to, or in any way enforcing, their 1956 contract with Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO, or any modification, extension, supplement, or renewal thereof, or any other contract, agreement, or understanding entered into with it relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until that organization shall have been recertified by the Board as the exclusive representative of such employees.

(c) Discouraging membership in Fishermen's Union, Local 33, ILWU, or in any other labor organization, by

discharging or refusing to hire employees because they are members of that organization, or in any other manner discriminating against employees or prospective employees in regard to their hire or tenure of employment or any term or conditions of employment, except to the extent permitted by Section 8(a)(3) of the Act.

(d) Requiring their crewmembers as a condition of continued employment to join or pay dues or support money to Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO.

(e) Assisting or contributing support to Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO, in any unlawful manner.

(f) In any other manner interfering with, restraining, or coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as permitted by Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Withdraw and withhold recognition from Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO, as the representative of their employees unless and until that organization shall have been recertified by the Board as the exclusive representative of such employees.

(b) Severally offer to the crewmembers whose names appear on Appendix A immediate and full reinstatement on the vessels from which they were discharged, unless such vessels have sunk, without prejudice to their seniority or other rights and privileges.

(c) Jointly and severally with the Respondent Union reimburse crewmembers for all moneys illegally exacted from them as dues, initiation fees, assessments, or support money, on behalf of the Respondent Union since January 4, 1956, in the manner and to the extent set forth in the section of the Intermediate Report entitled "The Remedy" as modified in the section hereinabove entitled "The Remedy."

(d) Jointly and severally with the Respondent Union make whole all the employees listed in Appendix A, attached hereto, for any loss of pay suffered as a result of the discrimination against them from March 30, 1956, in the manner set forth in the section of the Intermediate Report entitled "The Remedy" as modified by the section hereinabove entitled "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all settlement sheets, payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of backpay due, the sums illegally exacted, and the rights of the employees involved under the terms of this Order.

(f) Provide to each crewmember now employed a signed copy of the notice attached hereto marked "Ap-

pendix B",[28] and provide the Regional Director for the Twenty-first Region with signed copies of such notices for posting at the offices of Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO, and Fishermen's Union, Local 33, ILWU.

(g) Provide to each crewmember now employed a copy of the notice attached hereto marked "Appendix C" signed by a representative of the Respondent Union.

(h) Severally notify the Regional Director for the Twenty-first Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

B. The Respondent Union, Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO, San Pedro, California, its officers, representatives, agents, successors, and assigns, shall:

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[28]The Regional Director is instructed to insert, on separate copies of the attached notice, the names of the individual vessels in the heading and below the signature line, and, on the notices to be distributed by the *New Sea Rover, Defense, City of Los Angeles, Columbia, Sea Scout, Liberator, Delores M.*, and *Ronnie M.*, to insert the words, "We will offer the following employees immediate and full reinstatement without prejudice to their seniority or other rights and privileges:" followed by the names of the employees discriminatorily discharged from the vessel as shown in Appendix A.

In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

1. Cease and desist from:

(a) Causing or attempting to cause the Respondent Employers named above to discriminate against employees by imposing any requirement of membership in the Respondent Union or the payment of any moneys to it as a condition of employment, or to discriminate in any other manner regarding their hire or tenure of employment or any term or condition of employment, except to the extent permitted by Section 8(a)(3) of the Act.

(b) Performing, giving effect to, or in any way enforcing its 1956 contract with the Respondent Employers or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with the Respondent Employers relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until it shall have been recertified by the Board as the exclusive representative of such employees.

(c) In any other manner restraining and coercing employees of the Respondent Employers in the exercise of their rights guaranteed by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Jointly and severally with American Tuna Committee and its boatowner members named above reimburse crewmembers of such boatowners for all moneys

illegally exacted from them as dues, initiation fees, assessments, or support money, from January 4, 1956, in the manner and to the extent set forth in the section of the Intermediate Report entitled "The Remedy," as modified in the section hereinabove entitled "The Remedy."

(b) Jointly and severally with the Respondent Employers named above make whole all crewmembers named in Appendix A for any loss of pay suffered as a result of the discrimination against them from March 30, 1956, in the manner set forth in the section of the Intermediate Report entitled "The Remedy," as modified by the section hereinabove entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records necessary to determine which employees are entitled to reimbursement and the amounts thereof.

(d) Post at its offices, copies of the notice attached hereto marked "Appendix C" for signature by the Respondent Union. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent Union's representative, be posted immediately upon receipt thereof, and be maintained by the Respondent Union for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that such notices are not altered, defaced, or covered by any other material.

(e) Mail to the said Regional Director signed copies of the aforesaid notice for distribution to the Respondent Employers as provided above.

(f) Notify the Regional Director for the Twenty-first Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the certification of representatives issued to Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO, in "Unit E" on October 20, 1958, in *Krist Gradis, et al.*, Cases Nos. 21-RC-4452 and 21-RC-4631, be, and it hereby is, set aside.

IT IS FURTHER ORDERED that the complaint herein, insofar as it alleges that Lawrence Zuanich, John A. Zuanich and Constanta Zardeneta d/b/a MV *Stranger* violated the Act, be, and it hereby is, dismissed.

MEMBER FANNING concurring in part and dissenting in part:

I agree with the majority that the Respondent Employers violated Section 8(a)(1), (2), and (3) of the Act and Respondent Seine and Line violated Section 8(b)(1)(A) and (2) with respect to the execution and enforcement of their January 1956 contract.

I disagree, however, with the majority's further conclusion that the Respondent Employers further violated Section 8(a)(3) of the Act by notifying their fishermen employees that they would not be responsible for personal belongings left aboard after December 31, 1955. The facts with respect to this issue are fully set forth in the Intermediate Report. Briefly stated, there had been a number of contracts between Local 33 and the Respondent boatowners, the last of which expired on December

31, 1955. On December 27, 1955, the fishermen employees, all members of Local 33, were requested to remove their personal belongings from the boats before January 1, 1956. This action of the employers was the culmination of an economic dispute between the boatowners and Local 33 that had kept most of these boats inoperative from about July 1955, to December, when the contract was at an end. As the Trial Examiner found, continued employment of the Local 33 crews would have meant that the boatowners would have had to settle with their crews on the basis of prices substantially in excess of the actual market value of the catch. The boatowners were unwilling to fish on these terms. Local 33 would not agree to less. Adding to their dilemma was the fact that two unions, Local 33 and Respondent Seine and Line, controlled the entire source of competent fishermen. Both Unions, it should be noted, would fish only on the terms of an unlawful closed-shop contract, executed *before* fishermen were supplied. As the Trial Examiner recognized, the Respondent Employers had little freedom of choice in this case: "They could try to seek agreement with Local 33 and they had before October done so without success. They could offer the cannery price and take along any competent person who was willing to go. The second alternative was chimerical and probably was not even considered. Local 33 members would not fish without a contract; nor would members of Seine and Line." In these peculiar circumstances to hold, as the majority does, that the termination of Local 33 crewmembers was unlawful discrimination seems to me to go a step beyond the statutory proscription. Section 8(a)(3) forbids an employer to discriminate against his

employees to encourage or discourage union membership. The majority find that the boatowners discharged their employees "to avoid dealing with Local 33." Obviously, an employer, who is opposed to a union or unionism and discharges an employee to rid himself of an unwanted union has engaged in discrimination that discourages membership in that union. But the facts in this case do not, in my opinion, neatly fit that niche. Here the inference is at least equally valid that the Employers replaced their Local 33 crews because they found it impossible to meet the economic demands of the crews, voiced adamantly through Local 33. Indeed, as I read the record, these boatowners would have preferred continuing to contract with Local 33 if they had thought it economically possible to do so. Under all the circumstances, I question whether the General Counsel has proved by a preponderance of the evidence that the termination of these employees is conduct of the type proscribed by Section 8(a)(3). Accordingly, I would dismiss this allegation of the complaint.

CHAIRMAN MCCULLOCH and MEMBER RODGERS took no part in the consideration of the above Decision and Order.

APPENDIX C

Seine and Line Fishermen's Union of San Pedro, affiliated with Seafarers' International Union, AFL-CIO *and* Fishermen's Union, Local 33, Fishermen and Allied Workers' Division, International Longshoremen's and Warehousemen's Union *and* William J. Horner; Anton Misetich; John Sestich; Giovanni Santo; Phil Crachiolo; Nick Gargas; Frank Amalfitano; Sal Manzella; Steve Gargas; John Zorotovich; Vincent Budrovich; Sal Genovese; Joseph A. Ferrante; Bernard Mattera; Frank Coscetti; John Stanovich; Joe Cardinale; Paul Biazevich; A. E. Lucido; Antonio Pisano; John Vilicich; Isadore Califano; Nick Marincovich; John Mardesich; Gaetano Scotti; John Ryono; Ralph Galante; Karou Suzuki; Andrea Spinoza; John Misetich; Jack Russo; Salvatore Castaldi; G. C. di Meglio; Pasquale Artiano; Frank Iacono; Anthony di Leva; Antonio d'Ambra; Liberato Aversano; Antonio di Bernardo; Peter Guarrasi; John Sima; Aniello Pilato; Andrew Rafkin, Jr.; Joe Califano; A. di Leva; Dominic Rocky; Anthony Pisano; Louis di Meglio; Ben Fukuzaki; Lawrence Zuanich; Carmen di Massa; John Scognamillo; Norman Mezin; Yutaka Yoshimoto; John Vilicich; Santo Trama; W. H. Gillette; Robert L. Williams; Frank Iacono; Joe Randazzo; Mike Trama; Robert F. Lamprecht; Guiseppe Russo; Don Kusar; John Alioto; Joe T. Lauro; W. C. Smith; Pasquale Lauro; John di Meglio; Tony Mattera; N. Wolf; John J. Guglielmo; John Vilicich; Alfredo Valtino; Tom Trama; W. E. Duggan; Don R. Marvin; Joe Barber, Jr.; Frank Trama; Tom Nishida; and Amos Hashimoto, Parties to the Contract. *Case No. 21-CB-879. March 2, 1962*

DECISION AND ORDER

On February 12, 1960, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled case, finding that the Respondent Union had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto.[1] Thereafter the Respondent Union and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

The Board has reviewed the ruling of the Trial Examiner made at the hearing and finds that no prejudicial error was committed.[2] The Board has considered the entire record in this case, including the Intermediate Report, the exceptions, and the briefs, and hereby adopts

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[1]This case was heard together with *Paul Biazevich,* 21-CA-2388, and related cases, in which the Trial Examiner issued a separate Intermediate Report. See 136 NLRB 13.

[2]The Respondent Union moved to dismiss the complaint on the following grounds: (1) Delay in issuing the complaint and in proceeding with the hearing. For the reasons given in *Paul Biazevich, et al.,* 136 NLRB 13, footnote 2, we find no merit in this contention. (2) Failure of the Trial Examiner to confine his findings of violations to the period from September 15, 1956, the beginning of the 10(b) period, to July 17, 1957, the date of issuance of the complaint. The record does not indicate, however, that the violations found ceased on the latter date. In any event, even if they did, the Board would retain jurisdiction to issue a cease and desist order herein. See *Consolidated Forwarding Company, Inc.,* 112 NLRB 357, footnote 2. (3) The fact that the Trial Examiner based his findings, in part, on his observation of the witnesses inasmuch as no witnesses testified in this case. Although this language was inapplicable, we find that this apparent inadvertence was not prejudicial. Accordingly, the motion to dismiss the complaint on these grounds is hereby denied.

the findings, conclusions, and recommendations of the Trial Examiner excepted as modified below:

1. The complaint alleges, and the Respondent Union admits, that it was a party to a union-security contract with the boatowners[3] named in the complaint. The Trial Examiner found the contract, executed in 1956, unlawful in various respects, as discussed below, and ordered the Respondent Union, *inter alia,* to cease and desist from enforcing the union-security provisions thereof with those boatowners whose individual operations meet the Board's jurisdictional standards. The General Counsel excepts to the refusal of the Trial Examiner to assert jurisdiction over the operations of all the boatowners listed below. We find merit in this exception.

In its Decision, Order, and Direction of Elections in *Krist Gradis, supra,* the Board found, on the basis of the entire bargaining history, including the 1956 contract here in issue, that approximately this same group of boatowners participated in group bargaining through the Fishermen's Cooperative Association, herein called the Co-op, with the Respondent Union, and that these boatowners therefore constituted a single employer for jurisdictional purposes. The Board accordingly asserted jurisdiction on the basis of the combined outflow of the boatowners as a group.

None of the boatowners appeared at the hearing herein, although served with notice. The General Counsel stated on the record in this case that jurisdiction over boats

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[3]We find that the boatowners and masters involved herein are employers within the meaning of the Act. *Krist Gradis, et al.,* 121 NLRB 601, footnote 33.

which individually failed to meet the Board's jurisdictional standards would depend on whether, as members of the Co-op, they constituted a single employer for jurisdictional purposes, which was a primary issue in *Krist Gradis, supra,* and would be decided by the Board in that case; and that he had refrained from offering such evidence in this case because an initial determination by the Trial Examiner would not be helpful to the Board on jurisdiction. The Respondent Union made no objection at the hearing to the General Counsel's announced method of procedure, and made no contention at the hearing or since then that the jurisdiction issue should have been relitigated in this proceeding, or that the facts are otherwise than as presented in *Krist Gradis.*

The Trial Examiner made no reference to the positions of the parties stated above. While he did refer to the Board's assertion of jurisdiction in *Krist Gradis,* he nevertheless recommended dismissal of the complaint as to the contracts with all boatowners which individually failed to meet the jurisdictional standards on the ground that "nowhere in this record is there evidence to support a finding that the contracts in issue were arrived at through multiemployer bargaining." The General Counsel contends in his exceptions that the Trial Examiner was obliged to take official notice of, and to follow, the Board's jurisdictional determination in *Krist Gradis.* We agree. On the basis of the Board's findings in the *Krist Gradis* case,[4] and for the reasons given therein, we shall,

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[4]See *Pittsburgh Plate Glass Company* v. *N.L.R.B.,* 313 U.S. 146; *N.L.R.B.* v. *Moss Amber Mfg. Company,* 264 F. 2d 107 (C.A. 9); *M. L. Townsend,* 81 NLRB 739, enfd. 185 F. 2d 378 (C.A. 9); *Fishermen's Cooperative Association, et al.,* 128 NLRB

as requested by the General Counsel,[5] assert jurisdiction over the following individual boats, and boats whose owners or masters were members of the Co-op—Seine and Line multiemployer unit:[6]

A. A. Ferrante
American Venture
Anthony M.
Bella Marie
California
City of Naples
Dor Ann
E. S. Lucido
Endeavor (Small)
Endeavor (Large)
Gaviota
Gigi
Josie Lena (Russo Bros.)
Lucy Ann
Mercury
New San Antonio
Nyna Rose
Nyna Rose II
Patriotic
Ralphy Boy
Redeemer
S. G. Guiseppe
S. Teresa
Saint Rita
San Antonio IV
San Silverio

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62. See also *Plant City Welding and Tank Company*, 123 NLRB 1146, 1156, where the Board stated, "It is well established that the Board may take official notice of its own proceedings and decisions, and rely thereon, including the use in an unfair labor practice case of evidence adduced in a prior representation case, especially where, as here, the evidence was submitted on the identical issue and the same parties were present and participated."

[5]We shall not, as requested by the General Counsel, assert jurisdiction over the *S. Restituta II*, owned by Salvatore Castaldi. This vessel was not in the multiemployer unit found appropriate in *Krist Gradis*, and there is no commerce data in the record on its operations.

[6]Although the names and/or ownership of some of the vessels listed below and in Appendix A, attached hereto, may have changed since the hearing herein, the names are listed as they appear in the record in this case.

Santa Rita	Sea Maid
Santa Maria	Stella Maris
Santa Teresa	Sunbeam
St. Aniello II	Tommy Boy
St. Augustine II	Twin Brother (Robert M.)
St. Christina	Two Brothers (City of Pacific Grove)
St. Christopher	Vittoria
St. George II	Windward
St. Lucia II	

2. Seine and Line admittedly was a party to its 1956 contract with the owners or masters of the above-named boats, which contract required, as a condition of employment, that all employees join and pay dues, or pay support money the equivalent of dues, to Seine and Line without allowing the statutory 30-day grace period; the payment of unspecified nonperiodic assessments; involuntary checkoff of such dues, support money, and assessments; and forfeiture of earnings by those not discharged for failure to pay amounts due to Seine and Line. We find, therefore, in substantial agreement with the Trial Examiner, and for the reasons fully set forth in *Paul Biazevich, supra,*[7] that Seine and Line thereby violated Section 8(b)(1)(A) and (2) of the Act.[8]

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[7]The union-security provisions of the contract involved herein are identical with those of the contract involved in *Paul Biazevich, supra,* with which this case was heard.

[8]As the record contains no evidence as to the enforcement of the union-security provisions found unlawful herein, we shall not adopt that portion of the Trial Examiner's recommended order requiring reimbursement of moneys unlawfully exacted.

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Seine and Line Fishermen's Union of San Pedro, affiliated with Seafarers' International Union, AFL-CIO, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining, performing, or enforcing the union-security and checkoff provisions of its 1956 contract with any of the above-named boats, their owners, masters, officers, agents, successors, or assigns, or any other employer over whom the Board will assert jurisdiction.

(b) Attempting to cause such employers to discriminate against employees in violation of Section 8(a)(3) of the Act.

(c) In any other manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by a lawful agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at its offices, copies of the notice attached hereto marked "Appendix."[9] Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent's representative, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for the Twenty-first Region, copies of the aforesaid notice for posting by the employers listed above for the same 60-day period. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent's representative, be forthwith returned to the said Regional Director for such posting.

(c) Notify the Regional Director for the Twenty-first Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

CHAIRMAN MCCULLOCH and MEMBER RODGERS took no part in the consideration of the above Decision and Order.

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[9]In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX D

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

SEC. 8(a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, * * * *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uni-

formly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;